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# Working as an expert witness within the family courts – the performance of giving evidence

Sarah Helps

## Which account to choose?

There are many stories I could tell about being an expert witness. I could describe, in an anonymised way, one of 350 assessments of children and families completed over the past 20 years; I could review some of the literature on how to conduct an expert assessment (Blau, 1998; Reder & Lucey, 1995), or the impact of the recent changes to guidance on the appointment of expert witnesses (Courts and Tribunals Judiciary, 2014; McCallum, 2014) and whether and how experts of different disciplines help or hinder the process of trying to decide what should happen for children (Brophy *et al.*, 2012; Ward, 2012). These are some of the texts that influence my practice and link the everyday to the current culture of expert-witness work.

Instead of doing these things, I want to tell a more intimate story, one I will situate within an autoethnographic framework. Autoethnography is an autobiographical genre of writing and research that links the personal to wider discourses. Autoethnographers use their own experiences as sources of data on which to reflect (Denzin & Lincoln, 2000; Bochner & Ellis, 2002; Holman Jones *et al.*, 2013). There are so many powerful and competing stories in the work of an expert witness; this account is one I feel that I can tell ethically and most fully own (Tolich, 2010), although even this account is not totally my own as it involves my account of the actions of others (Morse, 2002).

Working as an expert witness involves making judgements that can have life-changing consequences for children and families. I do not wish to tell an 'othering' story of the pain, distress, abuse and trauma experienced by the families I have met, but wish to focus on my experience. I write from the particular in the hope that it is possible for others to reflect on and perhaps develop their own practice from reading this (Sparkes, 2001). In line with the practice of others who write about their experiences (Wright, 2009), the text in italics reflects my notes, taken soon after a court appearance, and the text in standard font reflects my ongoing reflections.

When not working in the NHS, I work within the family-court system as an expert witness. I accept instructions from solicitors working in the public-law systems, mostly after care proceedings have begun. The instructions I receive usually concern children and families about whom the local authority has become so concerned that they are about to be, or have been, removed from the care of their parents.

## What am I doing here?

My task as a clinical psychologist and family therapist is to answer questions, agreed by the solicitors for each of the parties involved (parents, child, local authority), about the

psychological well-being of parents and children, and to assess the nature and quality of relationships between people. I am usually asked to give recommendations as to what might help the parents meet the needs of their children, who might provide such input, how long this input might last and how likely it is that such input would make necessary and sustainable difference. My particular focus is on providing assessments of parents and/or children who have neurodevelopmental disorders or learning disabilities.

## Standing, watching and waiting

*As I walk from the back of the courtroom to the front, I remember the very first time I stood up before the judge, most consumed by anxiety and worried I would not do justice to what I knew and believed. I recall how red my face turned, how desperate I was to take off my jacket and cool down, how I wobbled as I picked up a glass of water, how I fumbled with the bundles of documents. Today, I am untroubled by the context and feel very focused on letting the judge know what I think, and on emphasising the parts of my assessment that I think are most important in determining the outcome for these two young children. I appreciate that the judge needs certainty and, where I do think in certain ways, I am no longer afraid to be robust in using my authority to convey my opinions. Where I am not certain, I am also robust in saying so – the way it felt back then as a new expert feels very different to the way it feels right now (Bochner, 2013).*

*So, I'm standing in the witness box, having just sworn to tell the truth, the whole truth and nothing but the truth, and struggling not to get into yet another debate with myself about the existence of God – or indeed truth. I notice the suit I am wearing, bought and worn only when I do this kind of work, is a getting a bit tight. Like all the other professionals, I'm dressed smartly and sombrely.*

I can dress like this because someone told me, a long time ago, how to dress at court and I know that, if I follow the dress code, then I don't feel so different or out of place. As for the family whose children we are here to talk about, do they even have a black suit? Did anyone tell them what to wear? Is the choice of jeans and a jumper a resource-based choice, a comfort-based choice, or something that they had not even considered, given the seriousness of the decisions that might be made today?

Today is the second day of the final hearing and, after today, the judge will decide whether the children, both under the age of two and currently in foster care, should be returned to the care of their parents, should live with their grandparents or should be placed for adoption.

I could sit in the witness box – a small wooden, slightly raised box to the side of the court room, but always choose to

stand, partly because I'm quite short so standing helps me more easily make eye contact with everyone in the room but also as a way of keeping my concentration focused, and of showing respect for the process and importance of the conversation that is about to take place.

*I look out at everyone else. Everyone else is sitting down. To my left is the judge, on her raised platform, sitting behind her desk in her fancy chair. Directly in front of me sits the court clerk. To my right, there's a row of barristers, this time six, one for each of the 'parties' (such a bad word, as this is no time for celebration). The barristers for grandmother, grandfather, mother, father, the children and the local authority squeeze into the front row. Laptops, iPad, files, legal pads – those blue ones with tear-out pages – cover the desks. Behind them sit the parties, the adults whose lives are under scrutiny, again squeezed in with the social worker and the children's guardian. Behind them, another row of legal representatives, junior barristers, and the social work team-manager.*

*I re-read the report I wrote about this family this morning on the train. It is a document over 50 pages long, containing a brief summary of the three lever-arch files I was sent, the interviews and observations I completed and my responses to the 22 questions agreed by the legal representatives. The [redacted] covered the psychological well-being of the adults and the children and my opinions about the quality and nature of the relationships between all the parties. I've described the methods and tools I have used in forming my opinion and the research- and practice-based evidence I have relied on in making sense of the information gathered. I see a couple of typos and worry about these.*

### The questions

I've given evidence at court many times before, more than 100, so I know the questions for me will start off from a barrister, usually the one representing the lead solicitor. They will take me through my report and my opinions and ask me if my opinion has changed since I wrote the report, based on any of the updating information I have been sent. I will then be cross-examined by the other barristers. Finally, the judge might ask some questions. I know I might be standing here for anything between one hour and five.

*The questions start coming: the first barrister stands up and asks: What's my full name? What's my professional address? How long I have worked with people who have a learning disability?*

*These are important questions, designed to establish my credibility and my authority to give opinions that may influence the life-changing decisions made by the judge. For me, they are also settling questions. I have no doubt about the answers to these questions and feel comfortable claiming the knowledge, experience and authority I have in working with children and adults with learning disabilities.*

*The questions start to become more complex. My inner dialogue pulls and pushes me in thinking about how to respond. I want to talk in 'easy-read' ways so that the mother and father, the people who may permanently lose the care of their children, can follow what I am saying. But I also need to establish that I can talk in professional ways so as to convince the judge she was right to authorise my instruction and that she was right to spend a large amount of public money on allowing my assessment. So, I find myself saying things twice, once in a straightforward way, once in a more formal way. I don't speak any other languages fluently but it feels like a complicated process of translation and interpretation.*

*As I answer questions from the barristers, I'm acutely aware of how the words I choose are written down and taped. The way I use my language in this context feels so different to how I might use it when talking with families in clinic.*

When asked a question, I try to pause and structure my answer before it comes out of my mouth. I have learnt from experience that rushing in can get me tangled up in what I'm trying to say. I also try to predict the line of questioning the barrister might be following, of where they are trying to get to in asking me these questions; so I try to answer the question in a straightforward way but also figure out what the next move might be and how my answer might lead to a particular issue.

### Relationships in court

*Today, a barrister I know well is representing the child. We occasionally travel home on the same train after a court hearing. The last time this barrister cross-examined me they were representing a mother, and were unsuccessful in persuading the judge to return the children to the care of her.*

It's a strange thing, but not an unusual thing for a systemic practitioner, to think about the different roles that people inhabit, and to adapt to those roles. But I often feel unsettled by how the relationships established with solicitors and barristers might look to the people they are representing and find it a complicated process of juggling between having barristers ask a series of very challenging questions, solidly testing my evidence and then, perhaps during the lunch break, chatting about holidays, the legal-aid authority and all sorts of things not to do with the case.

I find eye contact tricky in the court setting. The expert witness training I completed tells me that the barrister asks the questions but that I reply to and make eye contact with the judge. I do want to make a relationship with the judge but find it very difficult to work in this triangular way, so I try to glance regularly at the judge, and at her pen, so as to keep in tune with her and in time with her note-taking.

I also want to acknowledge the brief but significant relationships I have made with the family members I interviewed. So, I work hard to look sometimes at them when I am speaking about them. I think this helps me retain a respect for each person and to retain an ability to speak in a balanced and ethical way, describing what I see as the strengths and survival tactics of everyone, as well as the things I see as having contributed to the awfulness of the situation.

### Giving evidence as a performative act

I see giving evidence in court as a performative act, with the court room as the stage and our plain, dark clothes (although no gowns and wigs) as the costumes. It feels not dissimilar to running a therapy session in front of a large reflecting team.

I particularly find helpful the dialogue with a judge at the end of the cross-examination. Not all judges do this and I think those who do use experts in this way seem to have a (possibly more systemic) view of how to use the process of the court to create news of a difference or change. This judge is a fan of these end-of-evidence discussions. It feels like the reflecting conversation we might have in front of a family towards the end of a session, part rehearsed but also part spontaneous, exploring the resonances and possibilities of what has been said.

*At the end of the cross-examination, the judge turns to me, offers her summary and invites me to comment on her thinking. I want to do this – I've got a strong belief about what I think should happen (as well as strong ideas about how things could have happened so as to have helped this family end up in a different place) so I want both to take her invitation but also not to overstep my mark by seeming to tell her what to do. Again, it's a fine balance and I stumble on my words, making false starts and revisions as I go. We talk, converse (a different kind of conversation to that which took place with the barristers) and then she thanks me, releases me and I go home.*

These exchanges can highlight to all those in the room how it is both solely the judge's responsibility to make the final decisions and how the judge values the opinions of all she hears from in coming to her decision. I think it also makes transparent the ways in which the judge uses and balances all that they have heard.

*On the way home, I think about what I said, the questions I was asked and try to make sense of my performance. What did the family make of what I said? Did they or could they hear how I tried to show their strengths as well as an account of why things had gone so wrong? What moved them and what angered them? How has their thinking about their situation changed as a result of listening to me standing there in the box talking about them? How might they reflect on the process of the final hearing in the weeks and months to come?*

I've occasionally had such conversations when parents have gone on to have more children in quick succession, and I meet them again to think about whether and how they might be able to meet the needs of the next child.

It is now usual practice for the lead solicitor to write to the expert to inform them how their evidence contributed to the final decision, and what if any weight the judge placed upon it. This is a useful, if slightly detached, feedback in helping me to think about how I go on in this work.

### Power and certainty

As I interview and observe, as I write my report and stand in the witness box, I feel the immense weight of the power of my position. I've spent time with this family, I've drunk their tea, and I've observed their interactions with their children. I've asked the kinds of personal questions and challenged them to account for what has gone so wrong in their care of their children. I've heard stories about intergenerational abuse and neglect, about battles to get their, and their children's, needs recognised and addressed. I feel the immense ethical responsibility to get things 'right' and to be balanced and fair. I feel angry they have been seemingly let down by health, education and social services, and also frustrated with them for not being able to make use of what they have been offered.

I feel the weight of the pressure to be certain, rather than taking the stance of uncertainty, tentative use of expertise and ongoing collaborative inquiry that informs my clinical work. Moving between the different ways in which my role and position of power is used, and maintaining the ability to be reflexive about this, whether standing in the witness box or doing other things, seems to me to be at the heart of remaining an ethical practitioner.

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Sarah Helps is a clinical psychologist and systemic psychotherapist. She enjoys juggling the roles of working with families where a person has an autism-spectrum condition or a learning disability, teaching, managing and working as an expert witness. She would be interested to hear from people who read this article with thoughts, comments and provocations. [shelps@tavi-port.nhs.uk](mailto:shelps@tavi-port.nhs.uk)